IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 20,108

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

AARON NEWMAN, DANIEL NEWMAN, PAUL NEWMAN AND CARL NEWMAN, A PARTNERSHIP D/B/A COLONY FURNITURE COMPANY, *Respondent*

On Petition for Enforcement of Orders of the National Labor Relations Board

BRIEF FOR RESPONDENT

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SUBJECT INDEX

AUTHORITIES CITED

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BRIEF FOR RESPONDENT

Respondent, Colony Furniture Company, files this brief in opposition to the Board's petition for enforcement of its orders in this matter. Respondent opposes enforcement of the orders on the grounds that: (1) the Board's orders are predicated on findings not supported by "the record

considered as a whole" and, in part, on matters not charged in the Complaint or litigated; (2) nonetheless, respondent fully complied with the order of the Board of November 15, 1963 (R. 41-43); (3) the so-called "Order Clarifying Decision" of September 14, 1964, is a nullity because issued in excess of statutory authority and in violation of the Board's own Rules and Regulations, and because it imposes illegal contract provisions on respondent and its employees (R. 46-48); and (4) the Board improperly refused to conduct an election on the petition filed by respondent on about February 5, 1965, because, due to the passage of time and the turnover of personnel in the bargaining unit, respondent is under no lawful obligation to recognize or bargain with the Union unless and until it demonstrates in an election that it currently represents respondent's employees.

I. COUNTERSTATEMENT OF THE CASE

In 1960, respondent voluntarily recognized the Union. Aaron Newman, the senior partner, and his son, Daniel, both negotiated with the Union on the terms of the agreement which was signed by Daniel on June 7, 1960, effective to July 1, 1961 (Tr. 111-112, 45-46). As during the 1961-1962 contract negotiations, those here involved, Aaron was not always present during the 1960 negotiations (Tr. 111). However, the agreement of Aaron, as well as of Daniel, was secured before the 1960 contract was signed by Daniel (Tr. 111-112).

Upon expiration of the first contract on July 1, 1961, respondent petitioned the Board for an election to determine whether, in fact, the Union did represent its employees. The election was won by the Union, which was certified on September 6, 1961 (Tr. 46-47). In the latter part of September 1961, negotiations for a new contract commenced with Aaron attending on behalf of respondent (Tr. 46-47). At the next meeting, held the first week in October, Daniel attended as respondent's representative (Tr. 48-49). At

this meeting, as Union Representative Taylor admitted (Tr. 49-50), the discussion related to "the health and welfare problem", "pension plan", "dues deduction, initiation fees", "grievance and arbitration", and "the question of back dues that the people owed". The Union left to respondent's election whether "to keep their present health and welfare plan" or adopt the Union's (Tr. 49-50). It was shortly after this negotiation meeting that Daniel held his meeting with the employees (see Bd. Br., p. 4). This meeting is discussed hereinafter (*infra,* pp. 15-17).

Thereafter, the Union filed a charge with the Board alleging that Daniel's statements to the employees at the meeting violated Sections 8(a)(1) and (5) of the Act (Case No. 21-CA-4549). Meanwhile, negotiations between the parties continued without interruption (Tr. 52-56). Ultimately, on January 12, 1962, in order to get rid of this baseless charge, and expressly disclaiming any admission of a violation of the Act, respondent entered into a settlement agreement (R. 9-10). Pursuant to the settlement agreement, the Regional Office of the Board was kept informed of the negotiations between the parties. On April 30, 1962, the Regional Director "closed" Case No. 21-CA-4549, stating that respondent had "complied with the provisions of the Settlement Agreement" (G.C. Ex. 1(i)).

During this period, there was no interruption to bargaining (Tr. 52-56). It was conducted much as it was during negotiation of the original contract. Except for the first meeting, and one on January 18, Aaron did not personally attend the negotiation meetings (Tr. 62-63, 123, 145). However, the Union knew that Aaron's approval would have to be secured to any final agreement before it would be signed. Aaron represented respondent at the first bargaining meeting in September (Tr. 47). Although the Union claimed that Aaron at this first meeting said that Daniel "would negotiate the contract and sign it with the union" (Tr. 48), it is clear that whenever a troublesome question arose during negotiations Daniel telephoned

Aaron so the Union representative could discuss the matter directly with Aaron (Tr. 61-63, 122-123, 128-132, 144). The January 18 meeting with Aaron (Tr. 123, 145) was set up by Daniel in an effort to resolve existing differences between Aaron and the Union, at which meeting Aaron "did most of the talking" (Tr. 145). In addition, the Union representative corresponded directly with Aaron, not Daniel, regarding matters (G.C. Ex. 8-10). Finally, the Union representative admitted that during negotiations Daniel told him "that he would have to get the approval of his father before he would sign the agreement" (Tr. 61; see also Tr. 143-144, 148).

From the beginning of negotiations in 1961, one of the stumbling blocks to the conclusion of a contract was Aaron's adamant opposition to arbitration (Tr. 55-56, 61, 102, 112-113, 120-121, 124). In an effort to break the deadlock, Aaron on February 28, 1962, sent the Union a contract proposal containing, *inter alia,* provisions for arbitration but reserving to respondent "sole" determination of employee qualifications in layoff situations (G.C. Ex. 7, 8). The Union, however, on March 6, 1962, in effect rejected this proposal and invoked the aid of the Federal Mediation Service (G.C. Ex. 10).

The first meeting before the Federal Conciliator occurred the "third week in March" with Daniel representing respondent (Tr. 76). One of the obstacles to an agreement was the Union's insistence upon a pension plan (Tr. 76). The Conciliator suggested that negotiations be suspended until the Union representative ascertained from the Union "executive board" whether this demand could be dropped (Tr. 78). After the "executive board" authorized abandonment of this demand, the parties met on May 18, 1962, again with Daniel representing respondent (Tr. 79). At this meeting, Daniel, as he had in the past, initially resisted the Union's arbitration demands because of his father's opposition to them (Tr. 79, 89-90). Upon being shown Aaron's contract proposal of February 28, provid-

ing for arbitration, and Aaron at the time being in a Boston hospital undergoing surgery and unavailable for consultation (Tr. 146), Daniel capitulated (Tr. 79-80, 89-90, 107). Moreover, under pressure from the Conciliator, Daniel also agreed to modify Aaron's February 28 proposal to make respondent's determination of employee qualifications in layoff situations reviewable under the grievance and arbitration procedures (Tr. 80-81, 141; G.C. Ex. 7, Art. V). After some give and take on other matters, Daniel and the Union reached agreement with the understanding that the Union would set forth the agreement in a written contract and forward same to Daniel (Tr. 89, 93). This the Union did on about June 8 (Tr. 93-94). The contract was to be for a fixed period of one year, automatically renewable from year to year unless terminated by notice (Tr. 92; G.C. Ex. 14, p. 8).

When Daniel received the written contract, he forwarded it to Aaron for ratification (Tr. 145). Aaron, however, at this time was back in the Boston hospital for a check-up on the results of the previous month's operation (Tr. 145-146). About a "week or 10 days" after June 8, the Union's representative telephoned Daniel regarding the contract, saying he "had to have the contract signed by the company or an indication that they were going along with that, so that I could call the people together to have them ratify the agreement so I could sign it" (Tr. 97, 152).[1] Thereafter, Daniel telephoned Aaron at the hospital to discuss the matter (Tr. 146, 150, 155). Aaron pointed out that recent "Supreme Court decisions made it very dangerous for an employer to put an arbitration clause in the contract without specifically spelling out what issues were to be arbitrated" and that he would like to meet with the Union "himself and discuss these things" when he could come to California in July (Tr. 146, 150, 155). Pursuant to this a meeting between the Union's representative and

[1] This quote is from the testimony of the Union's principal negotiator, Roy Taylor (Tr. 43).

Aaron was arranged for and held on the "second Saturday in July," which was July 14 (Tr. 100).[2]

At the July 14 meeting, Aaron reminded the Union representative that he was opposed to arbitration "right from the start" (Tr. 101), and stated that while he had agreed to it in his February contract proposal recent court decisions had caused him to have "a change of heart" (Tr. 120-121). The Union representative, however, refused to discuss revision of the agreement negotiated with Daniel and said "Sign it or I am going to the National Labor Relations Board", and walked out of the meeting when Aaron stated that he had come to the meeting at 8:30 a.m. on a Saturday morning "in good faith to talk to him about this contract" (Tr. 150-151, 101).

Thereafter, the Union made no attempt to meet with respondent in an effort to resolve Aaron's objection to the arbitration provisions. Instead, on July 30, 1962, the Union filed the initial charge in Case No. 21-CA-4906, claiming a violation of Section 8(a)(5) of the Act because of respondent's refusal to execute the agreement as reached on May 18, 1962 (R. 11). Subsequently, the Union on September 26 and 28, 1962, filed amended charges, also restricting their allegation of a Section 8(a)(5) violation to refusal to

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[2] The Trial Examiner (R. 26), and the Board in its brief (p. 8), erroneously fix the meeting as occuring on "about July 18." However, the Union's representative stated that the meeting occurred on the "second Saturday in July" (Tr. 100), which the calendar shows was July 14, 1962. Also, the Board in its brief (pp. 7-8), as did the Trial Examiner (R. 26), recites alleged conversations between the Union representative and the Conciliator. Objection to receipt of testimony as to these conversations was timely raised by respondent on the ground of "hearsay on hearsay" (Tr. 100, 98). The Trial Examiner stated, however, that he would receive the testimony solely to "get a sequence" "step by step" (Tr. 100). It plainly was error for the Trial Examiner thereafter to make use of this challenged hearsay evidence to support his findings, and for the Board in its brief before this Court to reiterate it as support for the Board's adoption of the Trial Examiner's findings. If the objectionable hearsay testimony were regarded as insignificant, it would not have been recited by the Trial Examiner and repeated by the Board in its brief.

execute the agreement (R. 12, 13). Thereafter, the Regional Director set aside the settlement in Case No. 21-CA-4549 and issued his Consolidated Complaint on all the Union's charges (R. 14-19).

On February 21, 1963, the Trial Examiner of the Board, after hearing on the Complaint, issued his Intermediate Report and Recommended Order (R. 23-24). The Trial Examiner found that respondent violated Sections 8(a)(1) and (5) of the Act, assertedly (1) by Daniel "attempting to undermine the Union" by his October 1961 meeting with the employees; (2) "by confronting the Union in negotiations with a divided and fluctuating bargaining authority", meaning Aaron and Daniel; and (3) by refusing "to execute a contract it agreed to on May 18, 1962" (R. 31). To remedy the asserted unfair labor practices, the Trial Examiner, among other things, recommended that respondent be directed to "Forthwith e x e c u t e the bargaining agreement reached by its negotiator and the Union's negotiator on or about May 18, 1962" (R. 32).

Respondent duly filed exceptions to the Intermediate Report and Recommended Order (R. 35-40), supported by brief with record references challenging the findings and order as unsupported by the record. As to the finding that respondent violated the Act by bargaining through both Aaron and Daniel, respondent pointed out in addition that such was *never alleged in the Union's charges or the General Counsel's Complaint, or litigated at the hearing,* as a violation of the Act (R. 39).

On November 15, 1963, the Board issued its Decision and Order (R. 41-43) in this matter in which, after reciting that it "hereby adopts the Trial Examiner's findings, conclusions, and recommendations with the modifications noted herein", it stated solely in the decisional part (R. 41-42) that:

> "We agree with the Trial Examiner's finding, and for the reasons stated by him, that Respondent did

not bargain in good faith with the Union and thereby violated Section 8(a)(5) and (1) of the Act. We note particularly that, as found by the Trial Examiner, Aaron Newman held out his son Daniel as having authority not only to negotiate, but also to conclude an agreement with the Union, and that after Daniel, pursuant to this representation, agreed upon terms of a new collective-bargaining agreement, Aaron repudiated his son's actions. We note Respondent's defense that, as the employees could reject an agreement concluded by their negotiator, so Respondent should be free to disavow the agreement of its representative. However, it is patent that Respondent understood at all times during the negotiations that any agreement reached would have to be ratified by the employees, whereas Aaron's representations to the Union's negotiator led the latter reasonably to believe that Daniel could conclude an agreement on behalf of Respondent."

In the "Remedy" section (R. 42), the Board stated as follows:

"To remedy the Section 8(a)(5) violation, the Trial Examiner recommended, in part, that the Board order the Respondent to forthwith execute the bargaining agreement reached with the Union's negotiator on about May 18, 1962. However, *more than a year has elapsed since the 1-year agreement was reached* between the negotiators for the Union and the Respondent and it is not clear whether the Union would now desire to submit this agreement to its members for ratification. Accordingly, we shall order the Respondent, upon the Union's request, *either to execute the foregoing agreement or* to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit and, if an understanding is reached, to embody such understanding in a signed contract.[1] *We believe that such an order,* together with the "cease and desist" provisions recommended by the Trial Examiner, are *adequate to remedy Respondent's violation herein.*" (Emphasis added)

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[1] *Warrensburg Board & Paper Corportion,* 143 NLRB No. 47, at p. 3.

In accordance with the foregoing, the Board revised the pertinent affirmative provisions of the Trial Examiner's Recommended Order (R. 42-43) to state as follows:

> "(a) Upon request by Furniture Workers Union Local 3161, United Brotherhood of Carpenters & Joiners of America, AFL-CIO *execute the agreement reached on May 18, 1962, but if no such request to execute is made, bargain* upon request with the Union as the exclusive representative of the employees in the appropriate unit." (Emphasis added)

and the recommended notice to employees (R. 43), in pertinent part, to read as follows:

> *"WE WILL, upon request, execute the May 18, 1962, agreement reached by us* and the negotiator of FURNITURE WORKERS UNION LOCAL 3161, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO; but if no request to execute is made, we will, upon request, bargain collectively with the Union as the exclusive bargaining representative of all employees in the following unit:" (Emphasis added)

Respondent promptly notified the Board of its intention to comply with the Board's order of November 15, 1963, and posted the "Notice to all Employees" as directed by said order for the required 60 days (R. 43, 34, 48). The Union, however, demanded that respondent execute the contract negotiated for a one-year term for a two-year period, namely for the period of May 1962 to May 1964 (see R. 44). This respondent refused to do as the Board's order of November 15, 1963, required no more than execution of the contract prospectively for the one-year term negotiated (*supra*, p. 8).[3]

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[3] The Board, presumably by mistake, asserts in its brief (p. 8) that "the Company has refused to this date to sign the contract." This, of course, is contrary to fact. Respondent, after issuance of the Board's order of November 1963, was prepared at all times upon request of the Union to sign the one-year contract for the negotiated term, as directed in that order (See R. 48). It refused solely to sign the contract for longer than the negotiated one-year term, as demanded by the Union and later directed by the Board in its September 1964 order.

Ten months later, on September 14, 1964, the Board "sua sponte",[4] asserting that it "was administratively advised that the Charging Party and the Respondent were in dispute over the interpretation to be given to the Decision and Order" of November 15, 1963, and without any notice to respondent or opportunity to present its position on the matter, issued its so-called "Order Clarifying Decision" (R. 44-45). Said so-called clarifying order purported to note "a latent ambiguity" in the original decision and order of the Board and modified the latter in material respects. In respect to the remedy section, the so-called clarifying order deleted the third sentence (*supra,* p. 8) and substituted therefor (R. 44) the following:

> "Accordingly, we shall order the Respondent, *upon the Union's request, either to execute the foregoing agreement, this agreement to be effective from May 18, 1962, to at least the next renewal date* as provided therein following signature, *or to bargain* collectively with the Union as the exclusive representative of the employees in the appropriate unit and, if an understanding is reached, to embody such understanding in a signed contract." (Emphasis added)

In respect to the order, it substituted for the above quoted paragraph (a) (*supra,* p. 9) the following (R. 44):

> "(a) Upon request by Furniture Workers Union Local 3161, United Brotherhood of Carpenters & Joiners of America, AFL-CIO, *execute the agreement reached on May 18, 1962, the agreement to be effective from that date to at least the next renewal date* as provided therein following signature, but if no such request to execute is made, bargain upon request with the Union as the exclusive bargaining representative of all employees in the following unit:" (Emphasis added)

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[4] In its brief (p. 9), the Board seems to suggest that this was upon a "motion." There was no motion filed in respect to this matter to respondent's knowledge.

In respect to the notice to employees, it substituted for the above quoted language (*supra,* p. 9), which was in the notice duly posted by respondent in compliance with the order of November 1963, new language (R. 45) as follows:

> *"WE WILL, upon request, execute the May 18, 1962, agreement reached by us* and the negotiator of FURNITURE WORKERS UNION LOCAL 3161, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO, *the agreement to be effective from that date to the next renewal date* as provided therein following signature, but if no request to execute is made, we will, upon request, bargain collectively with the Union as the exclusive bargaining representative of all employees in the following unit:" (Emphasis added)

Outraged by this action, respondent promptly moved the Board for reconsideration of its so-called clarifying order (R. 46-49). In the motion, respondent, *inter alia,* challenged the Board's right to act on "administrative advice" from undisclosed sources outside the record and which was not made known to respondent; pointed out that there was no "ambiguity" in the original order which needed "clarifying," and that the September 14, 1964 order, instead, "substituted a brand new remedial order for the prior order of November 15, 1963"; called to the attention of the Board the provisions in Section 10(d) of the Act, and in Section 102.49 of its Rules and Regulations, which prohibit modification of an order, "in whole or in part," except "upon reasonable notice" (*infra,* pp. 35-36); and challenged the Board's Authority 10 months later, and after respondent had taken all steps required to comply with the original order, to change its order and impose new and different sanctions on respondent.

On November 30, 1964, the Board, without explication, "denied" the motion for reconsideration "as lacking merit" (R. 50). Thereafter, respondent notified the Regional Director that it would not comply with the new remedial directives of the so-called Order Clarifying Decision.

On about February 1, 1965, respondent petitioned the Regional Director for a new election.[5] The Regional Director dismissed the petition, asserting that respondent "has not yet complied with the Board's Decision and Order dated November 15, 1963, as clarified by Order dated September 14, 196[4]." Respondent's request to the Board for review of the dismissal was denied. Copy of Request for Review by the Board is attached as Appendix A hereto (*infra,* pp. 45-50).[6]

This is the factual situation upon which the Board seeks this Court's aid in now imposing upon respondent and its present employees—practically all of whom have been hired since the 1961 election and had no part in selecting the Union as their representative—the terms of a contract for four years which, on its face, shows was intended to be effective only for a fixed term of one year (G.C. Ex. 14). This contract, which the Board claims, over respondent's objection (R. 46-48), must be observed without exception, not only specifies controlling wages, hours and working conditions, but also requires adherence to terms that are clearly illegal. Thus, four years after the election respondent's current employees would be required to become and remain Union members and pay dues for the duration of their employment under the retroactive contract or be subject to discharge (G.C. Ex. 14, Art. III)—even though a majority of them started working for respondent after May 18, 1962, the commencement of the contract period under the Board's second order (R. 44). Also, respondent may be responsible to the Union under the Board's second order for the check off of dues for employees no longer in its employ who, after May 18, 1962, had unrevoked check off authorization cards on deposit

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[5] The petition was docketed in the Los Angeles Regional Office as Case No. 21-RM-1161.

[6] Respondent's request to the Board that this document and the other formal papers in the representation case be incorporated in the certified record transmitted to the Court in this matter was denied.

with respondent and continued thereafter for a period to work for respondent (see G.C. Ex. 14, Art. III). In addition, respondent would, in violation of Section 302 of the Labor Management Relations Act, 1947 (29 U.S.C. Sec. 186; *infra,* pp. 51-52), unlawfully be required to deduct Union dues for the full four years from the pay of any employees with unrevoked check off cards still employed by it, and such employees would unlawfully be deprived of their right under Section 302 to an annual escape period and, instead, illegally would be bound to the check off for the four years. Thus, the Board not only disregarded respondent's contractual right to the opportunity to terminate the contract at the end of the first year, or any subsequent year (G.C. Ex. 14, Art. XII), but also disregarded the employees' protected right at law to an opportunity to terminate a check off authorization annually.

It would be illusory to assume that the Union would afford respondent's employees an opportunity to demonstrate in a vote on ratification whether, in fact, a majority of them now desire to be bound by this union-shop contract. Only members of the Union would be permitted to vote on ratification, as the Board recognized in its November 1963 decision (R. 42).[7]

II. SPECIFICATION OF ERRORS

1. The Trial Examiner erred in receiving, over respondent's hearsay objection, testimony of the Union's representative regarding his conversations with a federal conciliator (Tr. 98-100), and the Trial Examiner (R. 26) and the Board (Br., pp. 7-8) erred in relying on this hearsay testimony to support their findings.

2. The Trial Examiner (R. 30-31) and the Board (R. 41) erred in finding that Daniel's October 1961 talk with

[7] In addition to those of respondent, the Union represented the employees of the members of the local Furniture Manufacturers Association (Tr. 110-111).

the employees was to undermine the Union, because not supported by the record as a whole.

3. The Trial Examiner (R. 26-30, 31) and the Board (R. 41-42) erred in finding that Daniel's agreement with the Union on May 18, 1962, was final and binding on respondent, because not supported by the record as a whole and contrary to fact and law.

4. The Trial Examiner (R. 28-30) and the Board (R. 41-42) erred in finding that Aaron was not permitted to reopen negotiations on the arbitration provisions, because not supported by the record as a whole and contrary to fact and law.

5. The Trial Examiner (R. 30, 31) and the Board (R. 41) erred in finding a "divided and fluctuating bargaining authority" between Aaron and Daniel which "lacked the bona fides" required by the Act, because not supported by the record as a whole and contrary to fact and law.

6. The Trial Examiner (R. 30, 31) and the Board (R. 41) erred in making any findings regarding the so-called "divided and fluctuating bargaining authority" between Aaron and Daniel, because not alleged in the Complaint or litigated.

7. The Trial Examiner (R. 31-32) and the Board (R. 41) erred in finding and concluding that respondent violated Sections 8(a)(5) and (1) of the Act, because such finding and conclusion are contrary to fact and law.

8. The Board (R. 42-43) erred in directing respondent to execute the agreement reached between the Union and Daniel on May 18, 1962, because such order is not justified on the record as a whole.

9. The Board (R. 44-45) erred in issuing its so-called Order Clarifying Decision, because it was not issued in compliance with the Act and the Board's Rules, it requires respondent to execute a contract for a period longer than

negotiated, it imposes illegal contractual conditions on respondent and its employees, and it deprived respondent of rights which had arisen as a result of respondent's compliance with the Board's Decision and Order issued 10 months previous.

III. ARGUMENT

In brief, respondent's position here is that — (1) the Board's findings that it violated the Act are not supported by "the record considered as a whole" (Sec. 10(e) of the Act; Bd. Br., p. 27); (2) the Board improperly found that respondent's bargaining through Aaron and Daniel violated the Act for the additional reason that such was not alleged in the Complaint or litigated; (3) in any event, respondent fully complied with the Board's order of November 1963, and discharged every obligation thereunder, and the Board's subsequent order of September 1964, was a nullity and illegal, and is unenforcible; and (4) respondent is under no further obligation to recognize or bargain with the Union unless and until it currently demonstrates in an election that it represents respondent's present employees.

A. THE RECORD AS A WHOLE DOES NOT SUPPORT THE BOARD'S FINDINGS

1. Daniel's Meeting With Employees

As the Trial Examiner found (R. 30, lines 33-34), this meeting occurred shortly after Daniel's first meeting with the Union representative in October 1961, at which, among other things, the deduction of Union initiation fees and dues, and the payment of back Union dues were discussed, and respondent was given the option of keeping its present health and welfare plan or adopting the Union's (*supra,* pp. 2-3).

A fair reading of the contradictive and conflicting testimony of the four employees who testified regarding this

meeting (Tr. 13-42) discloses merely that when Daniel Newman spoke to the employees he stated that he had met with the Union and it had submitted a "fair" contract (Tr. 36, 41, 20); that if he signed the contract some employees probably would leave and that if he did not others probably would quit (Tr. 36, 20-21); that if he did sign a contract with the Union, old employees who had not paid dues since expiration of the prior contract would have to pay their back dues in two installments (Tr. 30), that new employees would have to pay their initiation fees and dues in one installment (Tr. 22, 41-42), and that it would be no use to request respondent to spread out the deductions over several pay periods because it was too great a burden on respondent to do so (Tr. 15, 22); that respondent had the choice of continuing its own health and welfare plan or adopting the Union's and it would like the employees' views as to which plan they preferred (Tr. 21); and that the "only thing" Daniel "left up to [the employees] to decide" was "which health and welfare plan [they] wanted" (Tr. 23).

Plainly this does not indicate any disregard by respondent of its bargaining obligation to the Union, as indeed the facts show did not occur. There is no evidence that respondent ever after the election challenged the Union's exclusive representative capacity, ever refused to grant the Union a union shop and check-off, or ever objected to a health and welfare plan. On the contrary, however, it is clear that the Union, under its contract demands, expected old employees to pay back dues owing from the date of the expiration of the prior contract on July 1, 1961 (Tr. 115-116) and new employees to pay both initiation fees and dues (Tr. 116), and that respondent in the past had had problems with employees who requested permission to pay their obligations to the Union in installments which respondent desired to avoid in the future (Tr. 117). Thus, it plainly was proper for Daniel Newman to advise employees that under a renewed "fair" contractual relation-

ship with the Union the employees could not expect respondent to arrange installment payments of Union obligations.

Further, it is admitted that the Union left it up to respondent to decide whether it desired to retain its existing health and welfare plan or shift to the Union's (Tr. 50, 118-119), and that agreement on this provision was reached with the Union which was entirely satisfactory (Tr. 118). Plainly, under these circumstances, no improper motive can be attributed to respondent in seeking the views of its employees on which plan they preferred—it was in the Union's interest as well as respondent's to have employee satisfaction with an agreement reached.

Moreover, it is plain that Daniel's remarks to the employees in early October 1961 were wholly unrelated to the question which arose in June and July 1962. Daniel's remarks in October related to the health and welfare plan and the payment of Union fees and dues, both of which matters had been settled to the Union's satisfaction long before the conciliation meetings (Tr. 116-118), whereas the issue in June and July related solely to arbitration. Therefore, there was no justification for the Board's action in setting aside the settlement relating to this meeting and litigating the subject in connection with an entirely unrelated matter which arose nine months later.

In any event, if the Board's findings regarding the disagreement over arbitration fall, the Board's order insofar as predicated on the October 1961 remarks of Daniel must also fall. This alleged unfair labor practice was fully remedied (R. 9-10) and the case was closed by compliance satisfactory to the Regional Director (G.C. Ex. 1(i)). The settlement was set aside and the matter reopened only because of the Union charges claiming that respondent had refused to execute the agreement reached on May 18, 1962 (R. 11-13).

2. Respondent's Request in June and July to Reopen Negotiations on Arbitration

There is no disagreement as to respondent's consistent opposition to arbitration. The Union's representative admitted that both Aaron and Daniel opposed it at "all the meetings we had with the exception of the last one"—the one with the Conciliator on May 18, 1962 (Tr. 55-56). As to that meeting, the Union Representative admitted that Daniel continued then to oppose arbitration until shown Aaron's contract proposal of February 28, 1962, containing provision for such (Tr. 107, 79-80, 89-90); *supra,* pp. 4-5).

a. Daniel did not have authority to conclude a contract without Aaron's ratification

The Board found that "Aaron Newman held out his son Daniel as having authority not only to negotiate, but also to conclude an agreement with the Union" (R. 41). The only foundation for this is Union Representative Taylor's testimony that Aaron, at the first bargaining conference in September, told him that Daniel "would negotiate the contract and sign it with the union" (Tr. 48). But this statement has to be interpreted in the light of the facts. In 1960, Daniel negotiated and signed the contract, but only after Aaron approved it (*supra,* p. 2). Moreover, Taylor admitted that early in the negotiations Daniel stated "that he would have to get the approval of his father before he would sign the agreement" (Tr. 61, 113, 121). Thereafter, Taylor recognized Aaron's veto authority by talking with Aaron over the telephone at Daniel's request several times during negotiations (*supra,* pp. 3-4); by meeting with Aaron pursuant to Daniel's arrangements on January 18, 1964 (*supra,* p. 4); by addressing correspondence to Aaron (*supra,* p. 4); and by demanding in his letter of March 6, 1962, that Aaron "delegate authority to someone locally to negotiate . . . and conclude our negotiations with a signed agreement" (G.C. Ex. 10). In a nutshell, as Daniel testified (Tr. 143-144, 148), Taylor fully recognized that any agreement reached with Daniel had to receive Aaron's subsequent approval.

The Board's Trial Examiner himself characterized Daniel as only a "figurehead negotiator" and stated that "actual negotiations had to be transacted with his father" (R. 30, lines 28-30) as "the real negotiator for the Respondent being, at all times, Aaron Newman (R. 30, lines 46-47). Thus, both the Union's representative and the Board's Trial Examiner recognized the fact that Daniel did not have final authority to conclude an agreement without Aaron's subsequent endorsement, contrary to the Board's finding (*supra,* p. 18).

The Trial Examiner, however, concluded that Aaron's letter to Taylor of March 14, 1962 (G.C. Ex. 11), conferred on Daniel authority which all knew he did not possess prior to that letter (see R. 27, lines 28-33). Such conclusion is contrary to the plain language of the letter. The letter merely states, "Our Mr. Dan Newman *is and has always been available to negotiate* with you. He has had ample authority *at all times*" (G.C. Ex. 11; emphasis added). This merely confirmed the "authority" Daniel had "at all times" to "negotiate"; nothing therein suggested an enlargement of Daniel's authority, or that such authority embraced the conclusion of an agreement without Aaron's ratification. To the contrary, the absence of any statement that Daniel had authority "to conclude an agreement" negates any inference that he did.

It is quite clear from Taylor's own actions and testimony after the May 18 meeting that *he* did not believe that Daniel had the authority at that meeting to conclude and sign a contract without Aaron's subsequent review and approval. Thus, first Taylor testified that, at the conclusion of the May 18 meeting with the Conciliator, Daniel said "'OK. . . . Draft it up'. [referring to the contract] He would sign it" (Tr. 89). However, Taylor quickly amended this to, "He says, 'Draft it up, *we* will sign'," plainly embracing Aaron within the scope of the pronoun "we" (Tr. 89; emphasis added). Moreover, Taylor made no move after May 18 to submit the proposed contract to the mem-

bership for approval, as it seems he normally would have done had he thought a binding and unconditional agreement had been reached with Daniel. Instead, Taylor waited a week or 10 days after he had mailed the contract to Daniel before inquiring as whether it had been signed (Tr. 97). Then his comment was that he "had to have the contract signed by the company *or an indication that they were going along with that,* so that I could call the people together to have them ratify the agreement so I could sign it" (Tr. 97; emphasis added).

If Taylor truly believed he had a firm agreement, he did not require its execution before submission to the membership for approval. Even more significantly, if he truly believed that Daniel's acceptance was final he would not have withheld action pending "an indication that [the company was] going along with" Daniel's agreement. The explanation of Taylor's statement is found in Daniel's testimony that he told Taylor at the end of the May 18 meeting that he "hoped" that his father would "permit" him to sign as he "didn't have the absolute authority to sign the contract without my father seeing it" (Tr. 141-142). Finally, unless Taylor recognized that the agreement was conditioned an Aaron's approval, Taylor would not have let the matter drag the additional several weeks pending the meeting with Aaron on July 14 (*supra,* pp. 5-6).[8]

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[8] The receipt of Taylor's testimony, over respondent's hearsay objection (Tr. 98-100), regarding his alleged conversations with the Conciliator, and its utilization to explain away this obvious inconsistency between Taylor's actions and his subsequent testimony (R. 26; Bd. Br., pp. 7-8), plainly was prejudicial error. Moreover, the incredibility of the testimony is fully demonstrated by the facts. Thus, according to Taylor, and the findings of the Trial Examiner, the Conciliator told Taylor "I don't think you have any problem. You meet with his father. Dan Newman said he would sign the contract if his father didn't" (Tr. 100; R. 26). However, the facts are that Daniel did not sign the contract and Taylor did not at the July 14 meeting demand that he do so in accordance with this supposed commitment to the Conciliator (Tr. 100-101).

The Board argues (R 28; see also Br., p. 14) that, "assuming limitations on Daniel Newman's bargaining authority, the agreement reached on May 18 was concurred in by Aaron Newman" because the arbitration provisions agreed to by Daniel on May 18 had been contained in Aaron's counterproposal of February 28 which had never been withdrawn.[9] However, there was no need for Aaron to withdraw his February 28 proposal. Taylor, in effect, rejected the proposal in his March 6 letter (G.C. Ex. 10) and, aware of Aaron's consistent opposition to arbitration, must have anticipated the consequence of such rejection. Moreover, the agreement reached between Taylor and Daniel on May 18 materially changed Aaron's February 28 proposal on arbitration in that it subjected respondent's determinations of employee qualifications in layoffs to arbitration, whereas Aaron's proposal had excluded such determinations from arbitration (*supra,* p. 5). In addition, other changes were made in Aaron's February 28 contract proposal at the May 18 meeting (*supra,* p. 5). Thus, an entirely new agreement emerged from the May 18 meeting—not Aaron's proposal of February 28 which Taylor had previously rejected.

b. Assuming Daniel's authority to conclude an agreement, Aaron's request for further negotiation on arbitration did not violate the Act

For the purpose of this discussion, respondent will assume that had Taylor, acting on Daniel's acquiescence in the arbitration provisions at the May 18 meeting, submitted the agreement to the Union's members for approval and had they approved it, respondent would have been foreclosed thereafter from seeking revision of the agreement on arbitration. But these are not the facts.

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[9] The Board concedes that Aaron had the right to withdraw this proposal (R. 28, lines 9-10).

Taylor was waiting for "an indication that [the company was] going along with" Daniel's agreement (Tr. 97) and, so far as the record shows (Tr. 161), Taylor has never submitted the agreement to the membership for approval. Absent such approval, there could be no agreement (Tr. 119, 148, 160) and, as Taylor admitted, he would have to "Go back into negotiation" (Tr. 161-162).

Thus, on Taylor's own testimony, no contract existed in the instant situation because Taylor had not submitted the May 18 agreement to the Union membership for approval. No mileage is available in the argument that the Union was entitled to a reasonable period in which to make such submission. Here it had two months before the meeting with Aaron on July 14 to make the submission and did not. In fact, as of the date of the hearing on December 13, 1962, five months later, it still had not done so (Tr. 161).

Thus, respondent's request for further discussion of the arbitration provisions occurred while matters were in a state of inconclusive negotiation due to the Union's reserved right to reopen negotiation in unlimited degree depending upon the wishes of the members. An employer may not be denied the right to reopen discussion on a single contract provision while the Union at the same time is reserving the right to reopen negotiations on any or all provisions.

Nor was respondent's request to reopen discussion on the arbitration clause "a blatant manifestation of bad faith," as the Board asserts (Br., p. 14). During negotiations the Union's position was that, if grievances were not to be settled by binding arbitration, the no-strike clause would have to be omitted (Tr. 59-60, 105-106). Respondent agreed with this (*ibid.*). When Aaron submitted his proposal containing arbitration on February 28, he omitted the no-strike provisions (Tr. 102-105; G.C. Ex. 7, Art. 1). Moreover, Taylor's written contract forwarded to Daniel on June 8 also omitted the no-strike clause (G.C. Ex. 14, Art. 1). Thus, respondent was in the position under the

May 18 agreement of Daniel of being subjected to the resolution of "all grievances which may arise" by arbitration, enforceable in the courts (*ibid.,* Art. IX), without the Union being bound to the results of arbitration by a no-strike clause. Under these circumstances, it plainly was not bad faith for Aaron to seek some limitation on the matters to be submitted by respondent to enforceable arbitration (see Tr. 146). Normally, a *quid-pro-quo* for arbitration is a no-strike clause; here there was none.

In addition, the situation here is distinguishable from the situation in a case like *N.L.R.B.* v. *Nesen,* 211 F.2d 559, 563 (C.A. 9), cert. denied 348 U.S. 820, cited by the Board (Br., p. 12), where the respondent sought to reopen negotiations on many items. Here respondent sought to reopen discussion only on arbitration—it did not seek renegotiations on union shop, check off, health and welfare plan, wages, or any other provision of the May 18 agreement.

Nor are the cases cited by the Board (Br., p. 13), where respondents without cause have refused to sign agreements reached or have repudiated signed agreements, pertinent here. Aaron assured Taylor that he had come to the meeting at 8:30 a.m. on a Saturday morning "in good faith to talk to him about this contract," but Taylor flatly refused to discuss or explore any change in the arbitration provisions (*supra,* p. 6). As the Trial Examiner himself noted, "such an exploration might possibly have had fruitful results" (R. 29, lines 48-49).

Thus, plainly, the issue is not whether respondent has refused to sign an agreement reached—respondent has not refused to sign—but whether respondent is foreclosed from reopening in good faith discussion on a single item in an agreement at a time when any or all terms of the agreement were subject to being reopened by the Union (*supra,* p. 22). This is not what the law means, we submit. See *Arkansas Louisiana Gas Co.,* 154 NLRB No. 72, 60 LRRM 1055, 1056.

B. THE SO-CALLED DIVIDED AND FLUCTUATING BARGAINING AUTHORITY WAS NOT ALLEGED OR LITIGATED

As stated (*supra,* p. 7), the claim that respondent violated the Act "by confronting the union in negotiations with a divided and fluctuating bargaining authority" between Aaron and Daniel was never put in issue or litigated.

The Union's charge of July 30, 1962 (R. 11) set forth the alleged refusal to bargain as follows:

> "Subsequently, unfair labor practice charges were filed against the employer in case No. 21-CA-4549, which was terminated by settlement agreement wherein the employer agreed to bargain collectively with Local 3161. On or about May 18, 1962 the employer and the union arrived at a settlement of the terms of a collective bargaining agreement; that since said date the employer has refused and continues to refuse to execute said agreement or put it into effect."

The alleged refusal to bargain was repeated in the same words in the amended charges of September 26 and 28 (R. 12, 13).

The General Counsel's Consolidated Complaint, after stating the claims regarding Daniel's October 1961 meeting with the employees, alleged the refusal to bargain thusly:

> "(e) Respondent negotiated in bad faith and with no intention of entering into any final or binding collective-bargaining agreement.
>
> "(f) On or about July 14, 1962, and at all times thereafter, Respondent has refused, and continues to refuse, to sign a written agreement embodying rates of pay, wages, hours of employment, and other conditions of employment, agreed upon between Respondent and the Union."

At the opening of the hearing, the General Counsel, in colloquy with the Trial Examiner, affirmed that "the allegations are that this settlement agreement was violated and * * * the violation lies in the fact that the General Counsel

alleges that the Respondent agreed on a contract at sometime subsequent to the settlement agreement, and then refused to sign it" (Tr. 11). Respondent's counsel agreed that "there are no other issues" (*ibid.*).

Moreover, the General Counsel, in his post-hearing brief to the Trial Examiner, makes clear that this question was neither raised nor litigated. In his opening statement in that brief[10] he stated "the General Counsel's theory" as follows:

> "This brief will discuss the General Counsel's theory of the evidence and the four issues presented by the evidence. The issues are:
>
> "(1) Whether Daniel Newman, in the exercise of either his actual or apparent authority, unqualifiedly agreed to a contract.
>
> "(2) Whether, absent such unqualified agreement, there was a meeting between the minds of Respondent's principal, Aaron Newman, and the Union.
>
> "(3) Whether, where ratification by the Union's membership is a condition precedent to the Union's execution of an agreement, Respondent may withdraw from the agreement prior to such ratification.
>
> "(4) Whether Respondent unlawfully circumvented the Union by misrepresenting the Union's position to its employees and requesting its employees to approve of the contract."

In addition to the foregoing, the closing of Case No. 21-CA-4549 on April 30, 1962, pursuant to compliance "with the provisions of the Settlement Agreement" (*supra,* p. 3), discloses that the General Counsel had no intention of alleging or litigating this claim. The evidence of the "divided" authority, except for respondent's futile attempt to reopen negotiations on arbitration after May 18, 1962, all related to the period preceding March 1962 (see R. 30, lines 30-34). This was during the time when the Regional Director was being kept currently advised of the

[10] This brief, although not incorporated in the record certified to the Court, is available to the Board in its files.

negotiations. Nonetheless, the Regional Director two months later closed Case No. 21-CA-4549 on the ground that respondent had up to that time fully complied with its bargaining obligation under the Act. Had the Regional Director, or the General Counsel, regarded respondent's bargaining procedure as unlawful, Case No. 21-CA-4549 plainly would not have been closed—as it was—by compliance with the Act.

This claim was raised *sua sponte* by the Trial Examiner after the hearing in his Intermediate Report (R. 30) and without affording respondent even an opportunity to argue against the enlargement of the Complaint or the merits of his newly claimed violation. The Trial Examiner's finding in this respect was adopted by the Board without discussion (*supra*, pp. 7-8), notwithstanding respondent's exceptions on this score (*supra*, p. 7).[11]

The actions of the Trial Examiner, and the Board, in this respect cannot be sustained. In the first place, neither the Trial Examiner, nor the Board, has the authority to enlarge the Complaint. The authority to determine what violations to allege and what issues to litigate is vested under the Act exclusively in the General Counsel (Sec. 3(d); *infra*, p. 50). See *Times Square Stores Corp.*, 79 NLRB 361, 364-365. Clearly, the General Counsel did not believe, any more than respondent, that he was litigating a claim that respondent violated the act by the so-called divided authority of Aaron and Daniel (see *supra*, pp. 24-25).

Moreover, it is settled law that findings of the Board predicated on matters neither alleged in the Complaint nor litigated cannot be sustained. See, *N.L.R.B.* v. *H. E. Fletcher Co.*, 298 F.2d 594, 600 (C.A. 1); *N.L.R.B.* v. *Johnson*, 322 F.2d 216, 219-220 (C.A. 6); *N.L.R.B.* v. *Bradley Washfountain Co.*, 192 F.2d 144, 149 (C.A. 7). For this reason,

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[11] Nor does the Board in its brief here (see Br., pp. 11-12) offer any justification for this action.

alone, the Court should deny enforcement of the Board's order insofar as it predicated on this finding.

On the merits, the absence of litigation of the issue hampers respondent's defense here. It should suffice, however, to show the lack of merit to this claim, to point to a few matters which by chance appear in the record. Thus, the negotiations in 1961 and 1962 appear to have been conducted in precisely the same manner as those culminating in the first contract in 1960 (*supra,* p. 2). Whereas Daniel did not have authority to conclude and sign an agreement without Aaron's approval (Tr. 61, 113, 121, 141-142), it is clear that short of this Daniel had responsible authority to negotiate. Thus, Union Representative Taylor admitted that on one occasion when he pressed Dnaiel with the question "if he signed [an agreement] would his dad live up to it," Daniel replied that "he would" but "would give him hell" (Tr. 61). Taylor also admitted that when he "discussed these various things" with Aaron, Aaron said "Well, you and Dan go on and work the thing out" (Tr. 61-62). When Taylor raised matters during negotiation on which Daniel knew Aaron had strong views, Daniel telephoned Aaron to afford Taylor on opportunity to convince Aaron otherwise (Tr. 61-63, 122-123, 128-132, 144).

Taylor's authority was similarly circumscribed. Thus, on certain matters he had to secure advance approval of the Union's "executive board" before taking a position during bargaining (see Tr. 78). In *all* matters, his agreements at the bargaining table were conditioned on subsequent approval by the members (Tr. 119-120, 161-162). As he admitted, he could not sign a contract until it was approved by them (Tr. 148, 160).

The Board (R. 41-42; Br., p. 13 fn. 5) distinguishes the limited bargaining authority of the parties on the asserted ground that respondent knew of the limitations on the Union representative's authority, whereas the Union did not know of the limitation on Daniel's authority. Such cannot

be supported on the record as a whole. Plainly, the Union's representative was fully aware that Daniel was unauthorized to sign an agreement without Aaron's approval (*supra,* pp. 18-20). But, in any event, the test of whether respondent's bargaining procedure violated the Act cannot turn on what the Union knew or did not know of the limitation on Daniel's authority, but must rest on whether the limitation on Daniel's authority under the Act was unlawful. Similar limitations customarily are imposed on bargaining representatives of unions, as they were in the instant matter.

Plainly, Daniel had the bargaining authority in the instant matter found sufficient by this Court and other courts and the Board in similar situations. See *Lloyd A. Fry Roofing Co.* v. *N.L.R.B.,* 216 F.2d 273, 276 (C.A. 9); *N.L.R.B.* v. *Almeida Bus Lines, Inc.,* 333 F.2d 729, 735 (C.A. 1); *Great Western Broadcasting Corp., d/b/a KXTV,* 139 NLRB 93, 129-130; *Midwestern Instruments, Inc.,* 133 NLRB 1132, 1139-1140; *McLean-Arkansas Lumber Co.,* 109 NLRB 1022, 1038.

Moreover, the facts are that with this so-called divided authority the parties nonetheless in 1960 reached complete agreement, and in 1961-1962 reached complete agreement on all matters except the arbitration provision, which Taylor refused to discuss with Aaron on July 14 (*supra,* p. 6).

As the Second Circuit, in *N.L.R.B.* v. *Fitzgerald Mills Corp.,* 313 F.2d 260, 267, cited by the Board (Br., p. 12), stated, "If in other respects good faith is found it is not enough to establish an unfair labor practice solely that the representative of the Company was not empowered to enter into a binding agreement." In that case, and in *N.L.R.B.* v. *Hibbard,* 273 F.2d 565, 568 (C.A. 7), also cited by the Board (Br., p. 12), there was other significant evidence of the respondent's concurrent refusal to bargain in good faith. In the instant matter, the only evidence of a claimed concurrent refusal to bargain is Aaron's attempt to reopen

negotiations on the single subject—arbitration. This, as shown above, did not violate the Act.

C. THE BOARD'S ORDERS

A reading of the Board's brief (pp. 16-24) leads respondent to the conclusion that the Board, as of this late date, still does not comprehend respondent's objections to the Board's so-called "Order Clarifying Decision" of September 1964 (R. 44-45), notwithstanding respondent's motion for reconsideration (R. 46-48). Respondent does not contest the Board's authority "to order an employer presently to execute a contract which he wrongfully refused to execute in the past" (Br., p. 16), even when "the agreed-upon contract * * * expired * * * after the issuance of a Board order" (Br., p. 19-20); nor the Board's authority to afford the Union an option between execution of such a contract or further bargaining (Br., p. 17). Such an order may reasonably be deemed necessary to "effectuate the policies of this Act" (Sec. 10(c) of the Act).

In fact, recognizing the probable propriety of the Board's order of November 15, 1963, respondent waived its right to contest the Board's findings in an enforcement proceeding and promptly and fully complied with the provisions of the order, including posting the directed "Notice to All Employees" for the required 60 days (*supra*, p. 9).

What respondent does object to is the Board's subsequent unlawful modification in its so-called "Order Clarifying Decision" of September 1964, of its order of November 1963. This subsequent order was issued on "administrative" advice undisclosed to respondent to correct a claimed "ambiguity" which did not exist, and without the required "notice" to respondent or opportunity to be heard. It unlawfully saddles respondent and its employees with a contract which has a term of three or more years (now four or more years), when respondent had agreed to a contract

for a term of only one year,[12] and which, under the Board's order, imposes illegal conditions (*supra,* pp. 12-13).

Moreover, the new order was issued months after respondent had fully complied with the order of November 1963, had advised the Regional Director in writing of its intention to do so, and had posted the ordered "Notice to All Employees" for the required 60 days (R. 48, 33-34, 43), and respondent reasonably had assumed that the case was at an end.

Under these circumstances, it is understandable why respondent felt "outraged" when the Board 10 months later, in September 1964, issued its deceptively entitled "Order Clarifying Decision," substituting a brand new remedial order for the prior order of November 1963 (R. 44-45). Plainly this so-called clarifying order exceeded the Board's authority and was a nullity, and respondent properly refused to recognize its validity.

1. The September 1964 Order Did Not Clarify, It Modified and Set Aside the November 1963 Decision and Order

The Board, in the September 1964 order, professed to see a "latent ambiguity in the language" of the November 1963 decision and order, and asserted to "clarify such language" by its September 1964 order (R. 44). However, there was no ambiguity, latent or otherwise. Nor did the September 1964 order merely clarify. Instead, it modified and set aside, in part, the prior decision and order and substituted a brand new remedy, imposing therein new and additional sanctions on respondent.

In its remedy section, the Board's decision of November 1963, in clear and unequivocal terms, stated that because

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[12] Although the contract that Union Representative Taylor testified was "the document that [he] sent to" respondent on June 8, 1962 (Tr. 93; G.C. Ex. 14), contains neither the month nor the day of execution or termination (G.C. Ex. 14, pp. 1, 8-9), Taylor testified that the agreement was for a one-year contract (Tr. 92).

"more than a year has elapsed since the *1-year agreement* was reached," and the Union may not "now desire to submit *this agreement* to its members for ratification," respondent would be required, at the Union's option, "either to *execute the foregoing agreement* or to bargain" (*supra,* p. 8; R. 42; emphasis added). The words "execute the foregoing agreement" present no ambiguity. In context, they could only mean—sign "the 1-year agreement" reached for the prospective term of 1-year after signing.

This meaning is also made clear in the concern demonstrated by the Board that the Union may not "now desire to submit this [1-year] agreement to its members for ratification." Nothing in the remedy section of the November 1963 decision remotely suggests that respondent was being required "to execute" a contract for a 2-year or more term, or that the members would have opportunity to vote on ratification of this contract for a 2-year or more term. As to this, such a suggestion is completely negated by the Board's comment that "more than a year has elapsed since the 1-year agreement was reached."

Nor is there anything in the Board's November 1963 order from which an implication of ambiguity may be drawn. The affirmative provisions merely direct respondent, upon request of the Union, to "execute the agreement reached on May 18, 1962" (*supra,* p. 8; R. 43). As shown, the Board in the remedy section recognized that the agreement which had been reached on May 18, 1962, was for a "1-year" contract *(supra).* Likewise, in the notice ordered posted respondent was directed merely to advise the employees that, upon request of the Union, it would "execute the May 18, 1962 agreement" (*supra,* p. 8; R. 43).

Thus, there is not even the slightest implication in the Board's decision and order of November 1963, either in the remedy section, or the affirmative directives, or the ordered notice to employees, that respondent was being directed to execute the 1-year agreement reached on May 18, 1962 for

a term of 2 or more years retroactive to May 18, 1962. If this were the intent of the Board there surely would have been at least some slight suggestion of this intent in its November 1963 decision and order. *The Board is not a novice in the field of devising remedies and issuing remedial orders. Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 198-200. It has been in that business now for 30 years.

That the November 1963 decision and order was "ambiguous," or required clarification, also is completely refuted by the fact that the remedy directed—execute the contract for the agreed term—was the customary remedy for violations like that found here. See *New England Die Casting Co.*, 116 NLRB 1, 5. As of the time of the Board's decision and order of November 1963, the Board had never directed a respondent in a similar situation to execute a contract for a term longer than the one on which agreement had been reached. See *Warrensburg Board & Paper Corp.*, 143 NLRB 398, 399; *Wait, Inc.*, 132 NLRB 1338, 1339; *Sheet Metal Workers Union (Inland Steel Products Co.)*, 120 NLRB 1678, 1679.

The Board has not, and cannot, cite a single case in which it, on or before November 15, 1963, the date of its original decision and order herein, or prior to respondent's compliance therewith, ever directed a respondent to execute a contract and give effect to it for a term longer than the term specified in the agreed contract. Nor has, nor can, the Board cited a single case in which an order like its November 1963 order has been so construed by the courts.

In this connection, the Board's assertion (Br., p. 20) that even after "the parties negotiated a new contract" in *Henry I. Siegel*, 147 NLRB 594, enf'd 340 F.2d 309 (C.A. 2), "the Board ordered incorporation in a written and signed document" of "a certain provision" the respondent had "wrongfully refused to incorporate" in a preceding contract, is without foundation. In that case all the Board did was to order the respondent *not to refuse in the future*

to incorporate such a provision in a contract were agreement reached on the provision's terms (see 147 NLRB, at p. 596; 340 F.2d, at p. 310). In any event, this decision of the Board was issued seven months after the Board's decision of November 1963 was issued in this case.

Smimilarly, the Board's assertion in its brief (p. 24, fn. 8) that the Board's "intention" in its November 1963 decision was to require respondent to execute the 1-year agreement reached for a two or more year term is "revealed" by the Board's citation in that decision of the *Warrensburg* case, is without support. A mere glance at the remedy section in the Board's decision of November 1963 (*supra*, p. 8; R. 42), discloses that the *Warrensburg* case was there cited solely in support of the option given the Union to demand either execution of the agreement reached or further bargaining. But what *is* "revealing" in the *Warrensburg* decision is that the Board there clearly disclosed that its intention was not to require a respondent to execute a contract for a term longer than that which had been negotiated. Noting that the respondent there had put the terms of the two-year contract into effect, the Board even refused to order the respondent, upon request, to execute the contract prospectively for its full two-year term saying, to do so, because of the respondent's compliance with it up to that time, "would unduly *extend* the contract beyond the term originally agreed upon" (143 NLRB, at p. 399; emphasis added).

It is also apparent on its face that the September 1964 order did not merely clarify the original decision and order. If this were the intention, the September 1964 document, whatever it might have been called, would simply have have said, in substance, that the Board construes the directive of the original order, namely, to "execute" the agreement reached on May 18, 1962,[13] to

[13] This is the directive, each time set forth in slightly different words, contained in "The Remedy," "Order," and "Notice" provisions of the November 1963 decision and order (R. 42-43).

require execution of the May 18, 1962 agreement effective from May 18, 1962, to at least the next renewal date as provided therein following signature. Presumably the Board would have cited authority for this construction of its order, and the issue here, or in a later proceeding, would be whether this was a reasonable construction of the words used. Under this procedure there would have been no requirement to re-post the notices to employees already posted or to post new notices. Instead, the Board deliberately set aside and modified its November 1963 decision and order by imposing new and different obligations on respondent, including the obligation to post a new notice after it had complied fully with the notice posting requirement of the original order. Having done this, the Board here argues at length that the September 1964 order should be enforced as a proper exercise of its "broad discretionary power" (Br., pp. 16-23), and advances only brief and spurious argument that it should be enforced as a proper *clarification* of the language of the November 1963 decision and order (Br., pp., 23-24).

The Board, in its brief (p. 22), in fact confesses that the Board in its September 1964 order modified its November 1963 decision and order by "choosing the remedy which more adequately repaired the unlawful damage," and then argues (Br., p. 23) that what was "modified" was "not the order but the cost of compliance therewith." But, in the Board's words (Br., p. 23), "this is sheer semantics." The Act and the Board's Rules prohibit the modification of "any finding or order" "in whole or in part," except "upon reasonable notice," and do not distinguish between modifications which merely increase "the cost of compliance" and other modifications (*infra,* pp. 35-36).

Respondent does not contend that the Board is without authority to remedy a situation like this because the "Board's processes have not been completed before" the term of the contract agreed to has expired (see Bd. Br., p. 20). Rather, respondent's complaint is that after the Board ordered the remedy customary in such a situation,

and respondent had fully complied with it, the Board, without regard to the limitations on its authority under the statute and its own Rules and Regulations, unlawfully devised and promulgated a new and different remedy, which, in addition, was illegal.

2. The Board's Modification of Its November 1963 Decision and Order Exceeded Its Authority and Was a Nullity

In the first place, the Board admitted that, in changing its decision and order of November 1963 by its "Order Clarifying Decision" of September 1964, it acted on so-called administrative advice. Respondent was neither informed of the nature of this administrative advice, nor given an opportunity to refute it or correct it. Plainly, Board action on this kind of advice, without disclosure to the parties and opportunity to counter is contrary to the provisions of Section 10 of the Act, which require cases to be decided on the record. Moreover, it is contrary to the basic concepts of due process which require that persons be apprised of the evidence against them and then be afforded opportunity to refute it.

Moreover, the Board's issuance of its second order, setting aside and modifying its original decision and order without notice to respondent or opportunity to be heard, clearly was in excess of its statutory authority and in violation of its own Rules and Regulations and, therefore, a nullity. Section 10(d) of the Act specifies that:

> "(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it."

Section 102.49 of the Board's Rules and Regulations, Series 8, as amended, in effect at the time of issuance of the September 1964 so-called clarifying order, provides, in pertinent part, that—

> "Sec. 102.49 *Modification or setting aside of order of Board before record filed in court; action thereafter.* — . . . until a transcript of the record in a case shall have been filed in a court, within the meaning of Section 10 of the act, the Board may at any time upon reasonable notice modify or set aside, in whole or in part, any finding of fact, conclusions of law, or order made or issued by it. . . ."

Thus, both the Act itself, and the Board's own Rules, condition the Board's authority to "modify or set aside, in whole or in part, any finding . . . or order," *"upon reasonable notice"* (emphasis added). This means notice in advance, as the Board concedes (Br., p. 24).

It is settled that when a "statute provides for notice and hearing, . . . an award made *without proper notice,* or suitable opportunity to be heard, may be attacked and set aside as without validity." *Crowell* v. *Benson,* 285 U.S. 22, 47-48 (emphasis added). See also *American Power & Light Co.* v. *S.E.C.,* 329 U.S. 90, 108.

It is likewise clear that the Board was bound by its own Rules to give respondent "reasonable notice" before modifying or setting aside its original order of November 1963. The disregard of these Rules also nullifies the Board's action here. See *Service* v. *Dulles,* 354 U.S. 363, 372-373; *U.S. ex rel. Accardi* v. *Shaughnessy,* 347 U.S. 260, 265-266.

The Board in its brief concedes (pp. 23-24) that "if the Board had originally intended to require the contract to be effective only in the period following its execution and then issued a subsequent order requiring the effective period to begin as of respondent's refusal to sign, this *would* constitute a modification of the original order and respondent would be entitled to reasonable notice prior thereto. Section 10(d) of the Act." *This is, in fact, what the Board has done and it has not cited a single case which would even suggest the contrary.*

If the Board could do so it would not have to descend in its brief (p. 24) to arguing that "the Board itself recited

that its September 1964 order was merely 'to clarify'," and that "Respondent's argument to the contrary . . . was presented to the Board . . . and was rejected." An administrative agency plainly cannot legalize unlawful procedure by itself affixing a lawful label to it, or by cavalierly rejecting "argument to the contrary."

3. Respondent Is Prejudiced by the Board's September 1964 Order

The Board seems to argue that respondent is not prejudiced by the Board's illegal modification and setting aside of its November 1963 decision and order and, therefore, is entitled to no relief (1) because respondent had agreed to the annual renewal of the 1-year agreement reached on May 18, 1962, absent timely notice of termination (Br., pp. 17-18), and (2) because, the Board asserts, respondent has not "changed its position in reliance upon, the Board's original order" and, therefore, the Board argues "This case is no different than it would have been had no Board order issued at all until September 1964" (Br., pp. 22-23).

However, such a contention is irrelevant. An order made without required notice is invalid (*supra,* p. 36). Moreover, a "denial of [a statutory] right must be deemed to result in injury." *Leedom* v. *Kyne,* 249 F.2d 490, 491 (C.A.D.C.), aff'd 358 U.S. 890. In addition, respondent in fact is prejudiced by the September 1964 order, and did change its position predicated on the November 1963 order.

Thus, respondent did agree that the 1-year contract would automatically renew itself year after year unless timely notice of termination were given (G.C. Ex. 14, p. 8). But the agreement reserved to respondent, as well as to the Union, the right to terminate the agreement at the end of the first and each successive year, if it desired. And this right was preserved in respondent under the Board's decision and order of November 1963. However, in the September 1964 order the Board directed respondent to executive the contract effective from May 18, 1962, to "at

least the next renewal date" (R. 44), without preserving in respondent the right, retrospectively, to terminate the contract as of the end of any preceding contract year. Thus, the Board, by its second order, deprived respondent of its contractual right to terminate the 1-year agreement on any anniversary date and forced on respondent a contract term of three or more years, now four or more years, when respondent had agreed only to a contract term of one year.

The Board's argument (Br., pp. 17-18) to the effect that respondent is at fault for not giving timely notice of termination—"without prejudice, of course, to its allegation that no contract had ever become binding," or that a "different problem might be presented" had it done so, is incomprehensible. It was respondent's belief that no final agreement had been reached in 1962. Therefore, there was no occasion in 1963 to give notice of termination; one does not terminate a non-existing contract. But had respondent done so, the gesture would have been futile. The Board would not concede that its authority to remedy a situation by ordering execution of an agreed contract could be thwarted by such a transparent maneuver. After issuance of the Board's order of November 1963, there was no occasion for respondent to give notice of termination either. Under that order a contract could come into existence only if the Union then agreed to "the 1-year agreement" (R. 42-43). The Union did not, and sought an agreement for a different term (*supra,* p. 9). Surely the Board is not suggesting that after issuance of the Board's second order in September 1964, respondent could have escaped any lawful consequences of that order by giving timely notice of termination prior to May of this year.

The other contention of the Board (Br., pp. 22-23), that respondent has not changed its position in reliance upon the November 1963 order and that the situation is no different than it would have been had no order issued at

all until September 1964, is equally without substance. It is undenied that respondent fully complied with the order of November 1963, posted the "Notice to All Employees" required by the order, and notified the Regional Director of such compliance (*supra,* p. 9). Thereafter, the Union neither requested respondent to execute the 1-year contract as required by the Board's order, nor requested respondent to bargain for a different contract (*supra,* p. 9).

In substance, respondent fully purged itself of any unfair labor practice it may have previously committed by voluntary and full complaince with the order of November 1963. Until issuance of the *sua sponte* second order in September 1964, no representative of the Board, to respondent's knowledge, questioned respondent's compliance. But by that time more than a reasonable period of time had elapsed since compliance and respondent was no longer required to recognize or bargain with the Union in view of the passage of time since the 1961 election during which period there had been an almost complete turnover of employees in the bargaining unit (see *infra,* pp. 47-50). See *Squirrel Brand Co.,* 104 NLRB 289, 290-291; *Northwest Photo Engraving Co.,* 106 NLRB 1067, 1068-1069; *Lansenberg Hat Co.,* 116 NLRB 198, 199.

The situation in this regard would perhaps be different had respondent been on timely notice of a contemplated revision of the Board's order. Presumably, this would have been by motion of the Union, or the General Counsel, formally requesting clarification or revision.[14] But no such

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[14] The Board (Br., pp. 22-23) suggests that respondent should have filed such a motion. However, respondent had no cause to do so. From the plain meaning of the language of the November 1963 decision and order, and knowledge of the manner in which similar orders in the past had been interpreted, respondent knew that all required was that it agree to execute the agreement prospectively for its term. To respondent's knowledge, only the Union contended otherwise, and the burden was on it, not respondent, to seek support for its strained interpretation (*supra,* p. 38-39).

action was taken by the Union, or the General Counsel. Instead, the Union stood fast on its sole demand that respondent execute the agreement for a term effective on its face from May 1962 to May 1964, and let time run against it. What the Board seeks here is to "exculpate" the Union for its unreasonable position and "deprive the . . . employees" (Br., p. 22) of their right currently to express their desires regarding representation by the Union.[15] This cannot be sustained as a proper exercise of "the broad discretionary power accorded the Board" (Bd. Br., p. 16).

4. The Board's September 1964 Order Requires Respondent and Its Employees to Submit to Illegal Contract Provisions

As noted (*supra,* pp. 12-13), the agreement which the Board asserts, over respondent's objection, must be observed without exception retrospectively to May 18, 1962, and prospectively to the next renewal date after signature, contains union shop and check off provisions. Thus, more than four years after respondent's then employees voted for the Union, respondent's current employees would be required to become and remain Union members and pay dues for the duration of their employment under the retrospective and prospective contract or be subject to dis-

[15] The Board, in this connection, also asserts that respondent did not "offer to put the bargained-for contract terms into effect pending resolution of its dispute over the interpretation of the Board's order" (Br., pp. 22-23). This is irrelevant. Respondent was not requested to do so by the Union, or the Board, and absent such a request would not have dared to even contemplate such unilateral action. The Board's order was clear and concise. The option was the Union's not respondent's, and the Union was fully aware of respondent's preparedness to honor the Union's proper exercise of the option. The Union could have requested respondent to sign the agreement in accordance with its interpretation of the November 1963 decision and order as providing for a prospective term of 1-year, while seeking Board clarification as to whether the decision and order, as the Union contended, also required execution of the agreement retroactive to May 18, 1962. Instead, the Union chose not to do so and must be required to assume the consequences of its inaction.

charge—even though a majority of them had no voice in the selection of the Union and started working for respondent after May 18, 1962, the commencement of the contract period under the Board's September 1964 order (*supra,* pp. 10-11).

However, the Act conditions the legality of such an agreement upon the Union being the "majority" representative of the employees as provided in Section 9(a) (*infra,* p. 51) when "such agreement" is "made" (Sec. 8(a) (3); *infra,* p. 51). While it may be assumed that the Union was the statutory representative of respondent's employees when agreement to the union shop provision in the "1-year" contract was reached on May 18, 1962, there is no basis for assuming it remained such over two years later when the Board issued its September 1964 order for the first time imposing on respondent and its employees a contract for a term of three or more years (which respondent never "made"), or that it remains such now when the Board is seeking through this Court to impose on respondent and its employees a contract having a term of four or more years. To the contrary, the only evidence is that the Union currently represents substantially none of respondent's employees due to the turn-over of personnel during the intervening years (*infra,* p. 47).

This case does not pose the question of whether *an employer* should be required, after the Union has lost its majority, nonetheless to purge its prior unlawful conduct by recognizing and bargaining with the Union. Rather, the question here is whether the Board may require *employees,* a majority of whom never had opportunity to vote for or against the Union and may not desire the Union, nonetheless to become members of, or at least pay dues to, the Union for what *now* would be a four year period even though respondent never agreed to a contract for more than a "1-year" term. It is submitted that the Board's September 1964 order in this respect is clearly illegal under the Act.

In addition, under the check off provisions of the four-year contract imposed by the Board, respondent would be liable to the Union for the check off of dues for employees no longer in its employ, who, after May 18, 1962, had unrevoked check off authorization cards on deposit with respondent, for the duration of their continued employment thereafter with respondent (*supra*, pp. 12-13). It also would be required to deduct dues for the full four years from the pay of any employees with unrevoked check off cards on deposit who are still employed by it (*supra*, p. 13). However, Section 302 of the Labor Management Relations Act, 1947 (*infra*, pp. 51-52), specifies that it is unlawful to enforce check off authorizations "for a period of more than one year, or beyond the termination date of the applicable collective agreement, *whichever occurs sooner*" (emphasis added).

Both of these illegal consequences of the Board's order of September 1964 were called to the Board's attention in respondent's motion for reconsideration (R. 48) but, like respondent's other objections and exceptions in this matter, were totally disregarded.

For this additional reason the Court should deny enforcement of the Board's September 1964 order.

D. RESPONDENT IS UNDER NO LAWFUL OBLIGATION TO FURTHER RECOGNIZE OR BARGAIN WITH THE UNION PENDING AN ELECTION

Assuming that the Board's decision and order of November 1963 is supported by the record, there is nonetheless no basis for requiring respondent now to recognize or bargain with the Union, or sign any contract with it, absent a current demonstration of its majority status in a Board election.

As shown above (p. 9), and more fully set forth in respondent's request to the Board for review of the Regional Director's dismissal of respondent's election petition (*infra*, pp. 45-46), respondent fully complied with the Board's order of November 1963 and discharged its

obligation to the Union thereunder. More than a "reasonable period" elapsed thereafter before issuance of the Board's *sua sponte* order of September 1964, by which time respondent was no longer required to recognize the Union whose majority status it in good faith doubted (*supra*, p. 39). In any event, the September 1964 order was a nullity and could impose no obligation on respondent to continue to recognize or bargain with the Union.

Respondent thereafter duly filed with the Board a petition for an election predicated on its good faith belief that the Union no longer represented its employees due to the almost complete turnover of personnel during the intervening years (*supra*, p. 12; *infra*, p. 47). The Board refused, improperly, to conduct an election.

Under these circumstances, respondent clearly is under no further duty to recognize or bargain with the Union, unless at some future date it demonstrates in an election that it does in fact represent the employees. This Court, it is submitted, should issue no order which would require otherwise.

IV. CONCLUSION

Wherefore, the Court should deny the Board's petition for enforcement in its entirety, or at least deny enforcement of the Board's invalid order of September 1964 and condition any enforcement decree on the Union demonstrating its current right to represent the employees is an election.

Respectfully submitted,

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CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Winthrop A. Johns
Winthrop A. Johns
Attorney for Respondent

September 17, 1965

APPENDIX A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
COLONY FURNITURE COMPANY
and
FURNITURE WORKERS UNION, LOCAL 3161

CASE NO. 21-RM-1161

Request For Review

Colony Furniture Company (herein called Colony), pursuant to Section 102.67 of the Board's Rules and Regulations, herewith requests review of the Regional Director's dismissal of the RM petition filed herein by Colony. The dismissal letter, served by mail, is dated February 17, 1965. Review is requested on the grounds that (1) a substantial question of law or policy is raised because of a departure from officially reported Board precedents, and (2) the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error affects the rights of Colony.

I. The Facts

On August 25, 1961 (Case No. 21-RM-741), the Regional Director conducted an election among Colony's production and maintenance employees at its plant at 1125 Lanzit Avenue, Los Angeles, California, as a result of which Furniture Workers Union, Local 3161 (herein called the Union), was certified, on September 6, 1961, as the employees' bargaining representative.

On November 15, 1963, the Board issued a decision and order in Case Nos. 21-CA-4549, 4906, directing Colony, upon request, to execute an agreement found by the Board to have been reached on May 18, 1962, or, if the Union so requested, to bargain with the Union over a new contract. On December 3, 1963, the Regional Director was advised of Colony's intention to comply with said decision and

order and of the posting of the required notices to employees. The notices remained posted for the required 60 days. Said agreement found to have been reached by the parties on May 18, 1962, provided for *a contract term of one year.*

Although fully advised of Colony's intention to comply with the said decision and order of the Board of November 15, 1963, the Union never requested Colony to execute said agreement *for a term of one year,* or to bargain for a new contract. Instead, the Union on November 27, 1963, and thereafter, demanded that Colony execute said agreement *for a term of two years* retroactive to May 18, 1962. This Colony properly refused to do, but reiterated its willingness to comply with the Board's said order as issued.

On September 14, 1964, without prior notice to Colony, and opportunity to be heard on the matter, the Board issued a so-called "Order Clarifying Decision," directing Colony to execute said agreement for, at least, *a term of three years,* retroactive to May 18, 1962, and effective to, at least May 17, 1965. Believing that this so-called "Order Clarifying Decision" was, instead, a modification of the November 15, 1963, decision and order, and that the Board exceeded its statutory authority, and violated its own Rules, in issuing it, and further believing that the action exceeded the Board's remedial powers, Colony timely moved on October 1, 1964, for reconsideration of the so-called clarifying order.

On November 30, 1964, the Board denied Colony's motion for reconsideration.

On December 31, 1964, the Regional Office was notified that Colony did not intend to comply with the Board's so-called clarifying order, as follows:

> "I have been in touch with my clients and while they had previously advised you of their intention to comply with the original decision and order of the Board of November 15, 1963, they are outraged by the Board's

> decision and amended order of September 14, 1964 and have no intention of complying with that unless the court of appeals directs them to do so."

By letter dated February 1, 1965, Colony forwarded the petition in the instant matter to the Regional Director for processing to a new election in the bargaining unit. In the letter, Colony explained that during the three-and-a-half years since the August 1961 election "there has been an almost complete turnover of the personnel in the unit" and for this reason it "doubts that the Union . . . at the present time represents any of the employees in the unit." Colony also reminded the Regional Director that more than a year had elapsed since he had been notified of Colony's "intention to comply with the Board's decision and order" of November 15, 1963, and "since compliance therewith." Accordingly, Colony stated, it believed "the employees presently in this bargaining unit are entitled to express *their* wishes as to whether or not they desire to be represented by the Union."

By letter dated February 17, 1965, the Regional Director dismissed Colony's petition for an election stating, *inter alia,* that—

> "It does not appear that further proceedings are warranted by reason of the Board's Order in Cases Nos. 21-CA-4549 and 21-CA-4906, requiring the Employer to bargain collectively with Furniture Workers Union Local 3161, United Brotherhood of Carpenters and Joiners of American, AFL-CIO, as the representative of the employees in the instant case. Our records show that this case has not been closed on compliance. I am, therefore, dismissing the petition in this matter."

II. Argument

The Regional Director's dismissal of Colony's petition is erroneous in fact and law.

It has been the Board's uniform policy over the years, absent a contract bar, to conduct a new election in a bar-

gaining unit after a year where an employer, as here, has a good faith doubt as to the union's current majority status. See, *e.g., Kimberly-Clark Corp.,* 61 NLRB 90, 92-93 and cases cited; *Celanese Corporation of America,* 95 NLRB 664, 671-674.

Colony plainly has just cause for its good faith doubt here three-and-a-half years later due to the almost complete turnover in personnel, and has backed up that doubt with its petition for an election. See *Celanese Corporation of America, supra,* at p. 674. There is no contract with the Union, or any union, which would bar an election.

When there is an intervening Board order to bargain, or a court decree enforcing such, the certification period is extended *only* until there has been compliance with the order or the degree. *Squirrel Brand Co.,* 104 NLRB 289, 290-291; *Northwest Photo Engraving Co.,* 106 NLRB 1067, 1068; *Lansenberg Hat Co.,* 116 NLRB 198, 199; *Armco Drainage & Metal Products Co.,* 116 NLRB 1260, 1261-1262.

In the instant matter, Colony was in full compliance with the decision and order of the Board of November 15, 1963, commencing in December 1963, and *Colony's compliance was not challenged by the Regional Director or a petition to enforce.* Instead, 10 months later, the Board on September 14, 1964, *sua sponte,* on so-called administrative advice, issued its so-called clarifying order.

Colony promptly challenged the Board's right lawfully to issue the so-called clarifying order. When the Board reaffirmed its improper clarifying order, Colony notified the Regional Director that it did not intend to comply with it unless the Court of Appeals directed it to do so.

Thus, Colony's compliance with the Board's decision and order of November 15, 1963, was unchallenged for a period of 10 months, and thereafter may be improperly challenged only on the basis of the Board's unlawful order of Septem-

ber 14, 1964. Under these circumstances, there is no valid basis for denying a new election on the ground that the Regional Office's file "has not been closed on compliance." There is no noncompliance with the law here.

There never has been an issue over bargaining with the Union pursuant to the 1961 certification—Colony at all times, up to the filing of the petition in the instant matter, has recognized the Union as the representative of the employees in the unit and has been willing to bargain with it as such. The question before the Board in the complaint case was whether Colony had reached agreement with the Union on May 18, 1962, on terms of a one-year contract. When the Board on November 15, 1963, issued its decision and order, finding that Colony had so agreed and directing it to execute the agreement or bargain for a new one, at the Union's choice, Colony promptly expressed its intention to comply. Since then, and up to the filing of the petition herein, the only disagreement, first with the Union and then with the Board, has been whether an alleged agreed-upon one-year contract should be extended, unlawfully, into a two or three-year contract. In other words, at no time since the certification has there been a refusal by Colony to discharge its obligation under the law to recognize and bargain with the Union. At all times since the Board's order of November 15, 1963, and up to the filing of the petition here, the *only* disagreement has related to the term of a contract—an issue which in no respect impugns Colony's good faith in challenging the Union's current majority in the instant matter.

Plainly, in equity and justice, a new election should be held in the instant matter before Colony should be required to bind its current employees to the terms of a contract, including union shop and check-off provisions, negotiated three years ago by a union selected by a different complement of employees. The Board has this authority, and the failure to exercise it under the circumstances here would, we submit, be an abuse. See *Brooks* v. *N.L.R.B.,* 348 U.S. 96,

103; *McLean* v. *N.L.R.B.*, 333 F.2d 84, 88-89 (C.A. 6); *N.L.R.B.* v. *Warrensburg Board & Paper Corp.*, 58 LRRM 2145, 2148 (C.A. 2).

III. Conclusion

For the foregoing reasons, the Board should grant this request for review, reverse the Regional Director's dismissal of the petition, and remand the case to the Regional Director with instructions to conduct the election as requested in the petition.

* * * * *

Dated February 24, 1965

APPENDIX B

NATIONAL LABOR RELATIONS ACT, AS AMENDED (29 U.S.C., SEC. 151 *et seq.*):

* * * * *

SEC. 3. (d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. . . .

* * * * *

SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment

to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made. . . .

* * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

* * * * *

LABOR MANAGEMENT RELATIONS ACT, AS AMENDED (29 U.S.C., SEC. 186):

* * * * *

RESTRICTIONS ON PAYMENTS TO EMPLOYEE REPRESENTATIVES

SEC. 302. (a) It shall be unlawful for any employer . . . to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

* * * * *

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

* * * * *

(c) The provisions of this section shall not be applicable . . . (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provded, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; . . .

* * * * *

APPENDIX C

The following table of exhibits referred to in respondent's brief is presented pursuant to Rule 18(f) of the Rules of the Court. References are to pages of the typewritten transcript of record.

Exhibit Number	Identified	Offered	Received
1(i)	10	10	11
7	64	90	91
8	65	91	91
9	65	73	73
10	66	75	75
11	66	75	76
14	93	93	93